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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the Telecommunications)
Act of 1996)

Telemessaging, Electronic Publishing and)
Alarm Monitoring Services)

CC Docket No. 96-152

To: The Commission

**OPPOSITION TO PETITION
FOR RECONSIDERATION OR CLARIFICATION**

The Alarm Industry Communications Committee ("AICC"), by its attorneys, hereby opposes the Petition for Reconsideration or Clarification filed by Southwestern Bell Telephone Company ("SBC") in the above-captioned matter.^{1/}

SBC has asked the Commission to rule that BOCs may discriminate against some alarm monitoring service providers and in favor of a chosen alarm monitoring company in the BOCs' supplying of ancillary services, such as billing and collection and marketing. This request is contrary to both the intent of Section 275 of the Communications Act and good public policy.

In enacting the Telecommunications Act of 1996 ("96 Act"), the Congress considered the rules by which the Bell Companies should be allowed to provide several specific services. In Section 260, the Congress determined that BOCs should be allowed to

^{1/} Southern Bell Telephone Company's Petition for Reconsideration or Clarification of Second Report and Order, filed May 5, 1997. See 62 Fed.Reg. 27603 (May 20, 1997).

provide telemessaging services subject to certain safeguards and conditions.^{2/} Again, in the case of Section 274, the statute permits BOC provision of electronic publishing so long as certain safeguards are observed.^{3/} In each case, the approach is modeled generally along the lines pioneered by the Commission in permitting the BOCs to enter the enhanced services market -- permit entry but impose safeguards to prevent anticompetitive conduct.

The Congress determined, however, that alarm monitoring services require greater protection from BOC anticompetitive acts than telemessaging or electronic publishing. For the five years immediately following enactment of the '96 Act, BOCs are flatly prohibited from providing alarm monitoring services.^{4/} The statute includes no safeguards like those in Section 274 because such an approach was deemed inadequate for the duration of the five year period.

Despite the five year ban, SBC seeks to become involved in the prohibited alarm monitoring services in a variety of ways. For example, it proposes to bill and collect for the services and to market them to its monopoly local telephone customers. During the Common Carrier Bureau's consideration of SBC's CEI plan, SBC represented in writing that it had no intent to discriminate among alarm monitoring companies in the supplying of these ancillary services, stating that "[SBC] will make available to other comparably qualified alarm monitoring services providers the same terms and conditions of the sales agency arrangement on a nondiscriminatory basis."^{5/} The plan was approved on that basis.^{6/}

^{2/} 47 U.S.C. § 260.

^{3/} 47 U.S.C. § 274.

^{4/} 47 U.S.C. § 275.

^{5/} Letter from Stephen S. Melnikoff, Vice President-Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, FCC (April 3, 1997).

Those representations notwithstanding, SBC's Petition for Reconsideration (filed only one month after its representation that it would not discriminate) seeks permission to discriminate among alarm service providers in supplying these related services, claiming that the absence of express safeguards in the '96 Act indicates an intent to give less protection to alarm monitoring services than to electronic publishing or telemessaging services. Such a backwards view of the intent of the '96 Act must be quickly rejected by the Commission.^{2/}

SBC offers three basic contentions to support its request that discrimination be permitted. Each of these claims is based on the same theme -- citing to other statutory or Commission provisions and arguing by analogy. First, SBC points to Section 274, the electronic publishing provision; next to Section 260, which pertains to telemessaging; and, third, to the Commission's Computer III rules for enhanced services. In each case, SBC argues that the comparison suggests it should be allowed to discriminate among alarm monitoring service competitors because a similar rule allegedly is not present in this case. SBC's comparisons are irrelevant.

^{5/}(...continued)

^{5/} Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service, Order, CC Docket Nos. 85-229, 90-623 and 95-20, released May 16, 1997 (Deputy Chief, Common Carrier Bureau) (hereinafter "*CEI Plan Order*") at ¶ 33 ("our approval of the plan is conditioned on SWBT abiding by the representations made regarding [SBC's] sales agency arrangements").

^{2/} Indeed, AICC believes the Commission misread the statute in its decision to permit the BOCs to engage in any marketing arrangements (even on a nondiscriminatory basis) for alarm monitoring services. Therefore, AICC has filed a petition for review of the *Alarm Monitoring Order* with the United States Court of Appeals for the D.C. Circuit. *AICC v. FCC*, D.C. Cir. No. 97-1385 (filed June 3, 1997). Rather than further gutting Section 275 by removing the nondiscrimination requirement, as SBC urges, the Commission should correct its erroneous interpretation of the "provision" of alarm monitoring to prohibit all marketing and sales arrangements during the five-year ban.

No other section of the '96 Act imposed an outright five-year ban on the provision of a service other than Section 275. Instead, for other services safeguards were deemed adequate and, in many cases, specific protections were included in the statute (*e.g.*, the marketing provisions of Section 274). Because the Congress imposed an outright ban in the case of alarm monitoring, no safeguards were included. This critical difference makes analogies to those other statutory provisions meaningless. And it makes SBC's arguments in favor of its right to discriminate unavailing.

The Alarm Monitoring Order^{8/}

identified two factors to be considered when addressing the question of impermissible "intertwining" of the interests of a BOC and an alarm monitoring service provider on whose behalf the BOC is providing marketing or sales agency services. The first factor is whether the terms and conditions of the sales agency or marketing arrangement will be available to other alarm monitoring companies on a nondiscriminatory basis.^{9/}

Obviously, nondiscrimination is central to SBC's compliance with Section 275. To reconsider that aspect of the *Alarm Monitoring Order* would be tantamount to a complete abandonment of the rationale of the decision.

Beyond the terms of the statute, logic and public policy also require denial of SBC's request. The conclusions underlying the enactment of the statute (which SBC clearly rejects) are that alarm monitoring services, of all the activities addressed by the Congress in the '96 Act, required the special treatment of an absolute prohibition. If nondiscrimination is a necessary safeguard in the case of services for which the anticompetitive risk is outweighed

^{8/} *Telemessaging, Electronic Publishing and Alarm Monitoring Services*, Second Report and Order, CC Docket No. 96-152 (released March 25, 1997).

^{9/} *CEI Plan Order* at ¶ 35. The second criterion is the compensation arrangement between SBC and its alarm monitoring partner.

by the benefits of BOC participation, it is nonsensical to suggest that discrimination should not be a concern in the case of services deemed to be so vulnerable to anticompetitive conduct as to merit a five-year ban on BOC entry.

In fact, SBC's petition demonstrates precisely the type of gamesmanship of which AICC warned in the Commission's consideration of the SBC CEI plan. On March 25, 1997, the Commission released the *Alarm Monitoring Order*, stating that nondiscrimination is a critical factor in BOC marketing of such services, based in part on SBC's repeated representations.^{10/} Subsequently, SBC expressly represented to the Commission in its letter of April 3, 1997, that it would not discriminate in its marketing of alarm monitoring services.^{11/} One month later, on May 5, SBC filed the instant petition for reconsideration asking the Commission to relieve it from its promise not to discriminate.

Having made the decision to permit the BOCs to market prohibited alarm monitoring services, it is imperative that the Commission preserve nondiscrimination as the cornerstone of its policy with regard to Section 275. The obligation to avoid discrimination is the key element to ensuring that SBC's marketing of alarm monitoring services does not so "intertwine" its interests with those of the alarm monitoring provider as to constitute the provision of alarm monitoring.^{12/} If SBC could discriminate, it would have every incentive to exploit its market power in order to advance the commercial success of its exclusive venture with a preferred alarm monitoring provider. Such a result would exceed mere

^{10/} See, e.g., SBC Reply Comments, CC Docket Nos. 85-229, 90-623 and 95-20 (June 7, 1996); Letter from Todd Silbergeld, SBC, to William F. Caton, FCC, CC Docket Nos. 85-229 *et al.* (July 18, 1996).

^{11/} See n. 5 *supra*.

^{12/} *Alarm Monitoring Order*, ¶ 38.

"marketing" and become the "provision" of prohibited services, in direct contravention of Section 275 and Congressional intent. So long as discrimination is forbidden, there will be some restraint on SBC's ability and incentive to continue to whittle away at the prohibition of Section 275. SBC will find it more difficult (though not impossible) to intertwine its interests with an individual alarm monitoring company if it must treat all others similarly.

For this same reason, the Commission should resist SBC's alternative request that, if nondiscrimination is not stricken from the *Alarm Monitoring Order*, at least it be relegated to a secondary consideration which can be overcome. SBC wants to remain free to make a showing at some future time that discrimination in favor of its chosen alarm monitoring provider remains outside the "provision" of alarm monitoring services. In other words, SBC asks that, if its petition is not granted here, the Commission allow it to replead its case in favor of discrimination an indefinite number of times in the future.

The Commission must draw some clear, bright lines if it hopes to avoid being called upon to referee an endless series of requests by SBC, and potentially other BOCs, to discriminate against some alarm monitoring providers and in favor of their preferred partner. As discussed above and throughout this proceeding, there are numerous legal and policy reasons to forbid discrimination and none in its favor. SBC should be told again, clearly and simply, that it cannot discriminate among alarm service providers in its provision of marketing or billing and collection services. Anything less will serve only to open a whole new set of opportunities for SBC to exploit its market power while claiming it is not "providing" alarm services.

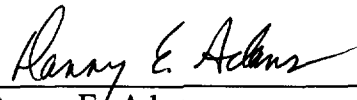
Finally, it should be noted that the Commission is empowered by the Communications Act to impose a nondiscrimination requirement on SBC's marketing of alarm

monitoring services quite apart from Section 275. The FCC's regulatory powers over the activities of a dominant incumbent local exchange carrier like SBC are sufficient to permit such requirements standing alone. For example, for many years before the enactment of the '96 Act, the Commission forbade ILECs from providing cable television services^{13/} or computer related services^{14/} pursuant to its Title II and ancillary powers under the Communications Act. Those powers were not removed by the '96 Act.

For all these reasons, the Commission should deny SBC's Petition for Reconsideration or Clarification.

Respectfully submitted,

**ALARM INDUSTRY
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^{13/} *Applications of Telephone Cos. for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307, *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.*, *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

^{14/} *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities*, 28 F.C.C.2d 291 (1970) (*Tentative Decision*); 28 F.C.C.2d 267 (1971) (*Final Decision*), *aff'd in part sub nom.*, *GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293 (1973).

CERTIFICATE OF SERVICE

I, Roberta Schrock, hereby certify that on this 4th day of June, 1997, copies of the foregoing "Opposition to Petition for Reconsideration or Clarification" were delivered by first class U.S. mail, postage prepaid, to the following:

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